Supreme Court of the United States

OCTOBER TERM, 1925.

WESTERN UNION TELEGRAPH COMPANY

Plaintiff in Error and Petitioner for Writ of Certiorari

vs.

STATE OF GEORGIA, as Owner of WESTERN & ATLANTIC RAILROAD

and

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

As Lessees operating said Railroad under the corporate name and style of Western & Atlantic Railroad

Defendants in Error, and Respondents to Petition for Writ of Certiorari

No. 24.

REPLY BRIEF FOR WESTERN UNION TELEGRAPH COMPANY

PLAINTIFF IN ERROR

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I.

Jurisdiction.

It was our understanding that counsel for

defendant in error did not dispute the existence of jurisdiction. In view, however, of the argument on this point in their brief, and particularly of the attempt made to distinguish this case from *Columbia Railway, Gas & Electric Company v. South Carolina,* 261 U. S. 236, a short reply on this point may be appropriate. We refer particularly to the argument on pages forty and forty-one, to the effect that the Georgia acts of 1915 and 1916 at least allowed to the Western Union its "day in court", and that an act which allows a day in court cannot impair the obligation of a contract; and to the argument on page fifty-six, in which the Columbia Railway case is discussed and an attempt made to distinguish it.

We do not understand that the defendants in error challenge the authority of the Columbia Railway case, or that they are asking this court to overrule it. Starting, therefore, with the assumption that that case is conceded to be controlling on similar facts, we hope to dispel any possible doubt as to jurisdiction by showing (1) that the case at bar has every element essential to jurisdiction which was present in the Columbia Railway case, and (2) that in the case at bar even greater effect was necessarily given to the statute by the courts below than in the Columbia Railway case.

(1)

Every jurisdictional element in the Columbia Railway case present in the case at bar.

The Columbia Railway case originated in the common pleas circuit court of Richland county, South Carolina. It arose on demurrer to the complaint. The question was whether a clause in a contract was a covenant merely, or a condition subsequent, breach of which authorized a forfeiture. The trial court held on demurrer that it was a condition subsequent. The demurrer was overruled, and, the defendant refusing to plead further, the judgment was affirmed by the supreme court of the State. Both the opinion of the circuit court and that of the supreme court of the State are reported in 100 Southeastern Reporter at page 355. The only reference to the statute of 1917—the statute which was relied on in this court as impairing the obligation of a contract, and which this court held to have had that effect—in the opinion of the circuit court was the following:

> "The legislative act of 1917, coupled with the alleged demand for possession and refusal, is equivalent to the exercise of the right of re-entry. (Citations.) A judicial proceeding was authorized by the act of 1917. (Citations.) The complaint shows no waiver by the State of any breach of conditions in the grant. The other specifications of demurrer were not pressed in argument. The purpose of this action is to determine

> whether the alleged conditions existed in the grant, and whether the defendant and those under whom it claims have violated them. Both the conditions and violations are alleged. If the defendant has any defense, it must be shown by answer."

In the opinion of the supreme court of the State there was no reference to the act of 1917 except the following:

> "The act of 1917 violates no constitutional right of defendant. *The legislature did not undertake to adjudicate anything, but merely declared that, in its opinion, a forfeiture had been incurred, and directed a judicial investigation and determination of the question in accordance with law.* The action is to enforce the obligations of the contract and not to impair them."

The judgment which this court reversed was the judgment of the supreme court of the State, and the construction placed by that court on the South Carolina act was undoubtedly recognized as controlling. If that is true, it seems idle to argue that a statute cannot impair a contract if it allows the complaining party a day in court. If the decision was influenced at all by the fact that the legislature had declared "that in its opinion a forfeiture had been incurred" we have the same situation in the case at bar, with the immaterial difference that here the declaration of opinion was not that of the legislature itself, but that of the administrative commission which the legislature had created and directed to inquire into the subject. If the remark of the circuit

court, that the legislative act, coupled with demand and refusal, was "equivalent to the exercise of the right of re-entry", was given any weight, we have the same situation here. In the most unfavorable view that can be taken of its rights, the Western Union was not a trespasser on the State railroad, but at worst a licensee under a revocable license. Before it could be ejected it was necessary for the State to take some action to revoke the license. The legislative act of 1916, coupled with the resolution of the Western & Atlantic Railroad Commission and the bringing of this suit, are precisely analogous in legal effect to the South Carolina act of 1917 and the bringing of the action in that case. In neither case was there any actual re-entry, or any other interference with the defendant's possession, but only the institution of a lawsuit by direction of the statute. Nor did the statute in the South Carolina case create any presumption, or shift any burden of proof. The question was one of law, as to the construction of a clause in a contract. The State courts distinctly declared that they were not bound by the legislative conclusion, but were examining the question of law for themselves. There was nothing that the defendant was required to do by the terms of the statute, in the way of submitting proof, which would have been unnecessary apart from the statute. There was nothing to be proved. It was simply the argument of a question of law.

(2)

Greater effect was necessarily given to the statute in the case at bar than in the Columbia Railway case.

In the Columbia Railway case there had been a breach of condition for which the State was entitled to re-enter. So far as appears, an action might have been brought to enforce the forfeiture by the Attorney-General of the State, in the name of the State, in pursuance of his general authority to represent the State in its legal affairs, without the authority or mandate of any particular statute. Not so in the case at bar.

In the case at bar the act of 1916 withdrew from the Attorney-General the right to bring any action to eject the Western Union from the State-owned railroad, and conferred on the Western & Atlantic Railroad Commission exclusive power to deal with this entire subject. The commission was given power to determine whether or not the Western Union was there without right, and if it was there without right to compromise with the Western Union on such terms as it might see fit (see our principal brief, Appendix, p. 106), or to take steps to eject it. The petition alleges that "pursuant to the authority and direction of said act * * * the said Western & Atlantic Railroad Commission * * * adopted a resolution authorizing and directing the counsel for the commission, William A. Wimbish * * * " to institute the present suit (record,

page 77); and that "in accordance with such authority and direction from the Western & Atlantic Railroad Commission this suit is brought" (*ibid*). The petition is signed, not by the Attorney-General of Georgia, but by William A. Wimbish. Had the Attorney-General of Georgia brought the suit, or had the suit been brought without a previous resolution of the Western & Atlantic Railroad Commission granting authority to bring it, it could not have been maintained as against the defendant's objection that by the acts of 1915 and 1916 the matter of investigating the Western Union's status, and removing it from the said railroad, if removal should be warranted, had been withdrawn from the jurisdiction of the Attorney-General and committed exclusively to the Western & Atlantic Railroad Commission. That the commission had found, as a result of its inquiry, that the Western Union was rightfully on the State railroad would have been a defense to the suit. So would it have been a defense if the commission had not yet completed its inquiry or passed its resolution. As a matter of fact, the defendant in its original answer raised the following issue as to the suit being brought by the authority of the commission:

> "Defendant for lack of sufficient information is unable to admit or deny * * * the allegation that this suit is brought in accordance with authority and direction from said commission. Defendant denies that said commission has such power and authority, * * *" etc. (Record, page 106).

And plaintiffs moved to strike out the denial "that said commission has such power and authority", etc.,

> "upon the grounds that under the act of November 30, 1915 and the amendment thereto of August 4, 1916, and the resolution of the Western & Atlantic Railroad Commission * * * the power and authority of said commission * * * do in law exist and are conferred by said acts of the general Assembly of Georgia and the lease contract made thereunder." (Record, page 130.)

And the plaintiff's motion was granted (record, page 131).

Whatever, therefore, may have been the Western Union's rights on the State-owned railroad, it is obvious that this particular action could not have been maintained, and this particular judgment could not have been rendered, without the acts of 1915 and 1916. If "some effect" was given to the South Carolina act in the Columbia Railway case, it is still more clear that effect was given to the Georgia acts in the case at bar.

II.

The Georgia Cases.

The Georgia decisions cited on pages 42 and 43 of our principal brief were not, it is true, decided prior to 1852, when the act on which we chiefly rely was passed. Those cases, however, did not make new law in Georgia. They merely declared what the law of Georgia had always been understood to be, and definitely determined that as it had been understood to be so it was and remained. Unless something to the contrary is shown, we do not have to go back of those cases in order to establish what the law of Georgia was in 1852.

For those cases are directly in point.

In the first three (*Goldsmith v. Rome Railroad, Davis v. Bank of Fulton,* and *Goldsmith v. A. & S. Railroad*) the titles of the acts involved did *not* contain the words "and for other purposes". Yet in the *Bank of Fulton* case (1860) "An act to incorporate the Bank of Fulton" contained a provision authorizing the joining in one action of all parties to a note or bill negotiated in the bank; in *Goldsmith v. A. & S. Railroad* (1879) "An act incorporating the Atlantic & Western Railroad" contained a provision that the railroad and its property should not be taxed beyond a specified amount on its annual income; in *Goldsmith v. Rome Railroad Company* (1879) "An act to incorporate

the M. Railroad & Steamboat Company" contained a provision that the company's stock should not be liable to any tax beyond a certain amount; and in each case the provision was sustained against the objection that it was matter different from the title.

Unless, therefore, the defendant in error has shown that there were decisions prior to 1852 which laid down a different rule, the law as of 1852 must be deemed to have been as announced in those decisions.

The earlier cases cited by defendant in error do not conflict with these authorities in the slightest degree.

Such earlier cases are three in number: *Mayor of Savannah v. State,* 4 Ga. 26 (1848); *Martin v. Broach,* 6 Ga. 21 (1849); and *Prothro v. Kendall,* 12 Ga. 36 (1852). In the *Broach* case the title of the questioned statute is not given, but at all events it was sustained as constitutional, the court remarking that the constitution "does not require that the title should contain a synopsis of the law, but that the act should contain no matter *variant* from the title". In *Mayor of Savannah v. State,* a statute provided for a commission to perform certain functions with regard to the waterfront "on the shore of Hutchinson's Island in the Savannah River, opposite the City of Savannah", and it was held constitutional, except as to a single section which purported to give the commissioners certain powers over the waterfront in an entirely different place; namely, on the south shore of the Savan-

nah River. In *Prothro v. Kendall,* two acts were considered. The first was entitled: "An act to authorize the clerks of the courts of ordinary, sheriffs, coroners and surveyors, to hold their office, during the intervention between the election and commissioning of their successors, and to regulate the transfer of papers and money"; and it was held that one section of the act, which purported to make it the duty of a newly elected officer to apply for his commission within twenty days, had "absolutely nothing" to do with the title, and was therefore void. The second was entitled: "An act to carry into effect the sixth section of the fourth article of the constitution", which provided that a collector or holder of public moneys should not be eligible to any State office until he should have accounted; and it was held that a provision of the act declaring that all officers who should fail to apply for their commissions within the time required by law should forfeit their offices and be ineligible to the vacancy had nothing to do with the title and was void. On the facts, there seems to be no question of the correctness of these decisions. We do not contend that the provision of the State constitution is entirely meaningless. It should of course be applied in a proper case; and these were proper cases.

We do however contend that a provision in an act incorporating a telegraph company, ratifying and approving a contract previously executed in the name of the State granting a right of way, and perhaps even more clearly a provi-

sion in such an act granting the company thereby incorporated a right of way in the future over State-owned railroads, are sufficiently germane to the subject-matter as expressed in the title to be valid under the rule laid down in the *Bank of Fulton, Rome Railroad* and *A. & S. Railroad* cases. As the court said in the *Bank of Fulton* case:

> "Under the title 'an act to incorporate the Bank of Fulton' no grant or privilege or franchise, necessary or proper to a banking institution, is matter different from what is expressed in the title."

There can be no grant or privilege more necessary or proper to a telegraph company than the grant of a right of way.

III.

The abortive condemnation proceeding.

Some stress is laid by the defendants in error on the fact that, instead of relying from the outset on the contract rights now alleged to have been impaired, the plaintiff in error attempted to condemn a right of way over this railroad, which attempt for technical reasons failed. In the hurry of preparing a general campaign to protect its lines along the Louisville & Nashville Railroad and its controlled companies, it is not remarkable that counsel for the telegraph company did not first make a minute examination of the local situation as to title to land and easements in land over each foot of the system separately. Even had this been done, it might have been supposed at the beginning that condemnation was a speedier and more convenient way of clearing up any doubt as to the title than to await the outcome of such a litigation as this. Since neither ignorance of fact nor mistake of law on the part of its original counsel can estop the telegraph company with respect to a matter in which the State of Georgia has not been misled or injured by the telegraph company's conduct, further discussion of this feature of the case seems superfluous. The story of how and why condemnation was resorted to is fully explained in the testimony of the witnesses Heyman and Atkins (record, pages 196, 297, 299).

IV.

The rights of A. A. & N. M. Tel. Co. passed to the Western Union.

The defendants in error attack the chain of title. In our principal brief, pages 10 to 13 and pages 72 to 77, we show why, for the purposes of this writ of error, it must be assumed that the chain of title is complete. The argument need not be repeated here. As a matter of history, it may be worth while pointing out that the exact facts with regard to the line, and the process by which it passed from the Augusta, Atlanta & Nashville Magnetic Telegraph Company into Hammet and from Hammett into Morris and others, the organizers of the American Telegraph Company, are set forth in full in the statement of facts in the case of *Kelly & Mitchell v. Morris*, 31 Ga. 54 (1860), a brief summary of which is attached as an appendix. It will be seen from the official report of this case that Hammett acquired the entire property of the company within the State of Georgia at sheriffs' sales "in several counties in Georgia, through which the telegraphic line passes, and in which the 'fixtures, furniture' etc. were found" (page 59); that the property "had been sold in Georgia by the sheriff, and purchased by Hammett, and had passed legally and peacefully into his possession" (page 61); that the defendants in that suit, Morris and others, were, by the plaintiffs' own showing, "in possession fairly and legally acquired" (*ibid*); and that this possession was held to be lawful.

The defendants in error say (pages 35 and 36 of their brief):

> "Those justices who were in favor of affirmance held:
>
> * * * * * *
>
> * * * * * *
>
> "'The sale to Hammett did not convey anything but personality'".

The subquotation is not found in either opinion, or elsewhere in the printed record. We find for the first time, since the matter is called to our attention by the brief of the other side, that it is printed as the concluding paragraph of the syllabus in the report of this case in 156 Georgia 409, 410. This syllabus is prefaced "RUSSELL, C. J.", indicating that it expresses the conclusions of the chief justice individually. It is followed by an opinoin, also prefaced "RUSSELL, C. J."; and this opinion ends with the statement "I am authorized to state that Mr. Justice Hill and Mr. Justice Gilbert concur in the views *herein* expressed". The opinion itself makes no reference whatever to the sale to Hammett; and we doubt, therefore, whether counsel for the defendant in error are correct in stating that all three justices who were in favor of affirmance held that the sale to Hammett did not convey anything but personality. Even if they did, however, it does not affect the question for two reasons:

(1) It is an obvious inadvertence. The record shows two sales to Hammett: one under a sheriff's deed covering the property in Richmond

county (Augusta), printed at page 145; and the other under a sheriff's deed covering the property in DeKalb county (Decatur), printed at pages 146 and 147. While the former deed covers only personalty, the latter explicitly includes

> "all the property pertaining and belonging to the said Augusta, Atlanta & Nashville Magnetic Telegraph line situated in the county of DeKalb, consisting of the post, wire and machinery and all the appurtenances right of way franchise Cia belonging thereto together with all and singular the rights members and appurtenances thereof, and also all the estate, right, title interest claim and demand of the said Augusta, Atlanta & Nashville Company in law equity or otherwise, whatsoever, of, in or to the same" (page 147).

Had this inadvertent misstatement of Chief Justice Russell in the syllabus been brought to the attention of plaintiff in error in time, it could and undoubtedly would have been corrected on rehearing.

(2) The chain of title however is not dependent on the two sample deeds printed in the record. These were the only deeds that could be actually found at the time of the trial; but the presumptions arising from the other facts proved, taken in conjunction with the fact, of which the Georgia courts took judicial notice, of the wholesale destruction of records during the Civil War, were regarded by Justice Custer and his associates as requiring at least the submission of the question of the chain of title to the jury; and as

pointed out in our principal brief the prevailing opinion clearly intimated that it was unnecessary to consider or decide this question. Even if one of the sales to Hammett appearing in the record "did not convey anything but personalty", the prevailing opinion did not decide anything as to the force of the presumption arising from the other facts, or of other sales to Hammett, one of which appears in the record and obviously includes right of way as well as personalty. The statement in Chief Justice Russell's opinion that

> "We hold that there was a failure on the part of the defendant in the court below (plaintiff in error) to establish its contention that it was the owner of any interest whatsoever in the right of way in the Western and Atlantic Railroad, either by grant, prescription, or otherwise."

must be taken in connection with what follows:

> "I am of the opinion that the judgment of the trial court in overruling (fol. 869) the motion for a new trial was right. There was no error in this ruling because, in my opinion, the verdict was demanded by the evidence for the reason that the case is controlled by two propositions under which the jury could not have found otherwise than they did, and for that reason the merits of all remaining assignments of error are irrelevant and immaterial. I freely concede that there were quite a number of errors in the conduct of the trial but none of them affected or could have affected the result reached in the case, and in my opinion, no other result could have been attained either as a matter of reason or of law.
>
> "There can be no question that the state

> is the owner of the right of way of the Western & Atlantic Railroad and has been its owner since the first beginning of the undertaking and from the time when the State invested its first dollar in the enterprise. It is immaterial whether the ownership is in fee or only an easement. But even if it be conceded for the sake of argument that the State only acquired an easement for its right of way it must be held that no right, interest, or enjoyment of even what the plaintiff in error admits is owned by the State has ever been lawfully granted by the State to anyone."

Taken as a whole, as we have already fully pointed out, the prevailing opinion shows that the question of the chain of title was not considered in reaching the conclusion that the judgment of the trial court was correct, and that the conclusion itself was based solely on the ground that the Augusta, Atlanta & Nashville Magnetic Telegraph Company never acquired any rights as against the State—in other words never had any contract which could be impaired.

Respectfully submitted,

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APPENDIX

Summary of

Kelly & Mitchell v. Morris, 31 Ga. 54 (1860).

The Augusta, Atlanta & Nashville Magnetic Telegraph Company was incorporated in 1852 by the acts of the legislatures of Georgia and Tennessee to construct a telegraph line from Augusta to Nashville. The line was completed in 1855, at great expense which left the company in debt. To pay off the indebtedness the stockholders made and authorized a mortgage on the lines of the company in both States. This mortgage was foreclosed in the State court of chancery at Nashville, Tenn., in 1856, and under the decree of foreclosure the entire property of the company in both States was sold to James Kelly and William Kelly, who later sold to the plaintiffs.

In the meanwhile Alvin D. Hammett and John H. Clover, judgment creditors of the company under common law judgments obtained in Georgia and docketed before the mortgage lien arose, purchased the entire property of the company within the State of Georgia at sheriffs' sales "in several counties in Georgia, through which the telegraphic line passes, and in which the 'fixtures, furniture', etc. were found;" (opinion of the court, page 59). After the foreclosure sale at Nashville, and before the sale by James Kelly and William Kelly to the plaintiffs, Hammett (for himself and Glover) sold the Georgia property

to the defendants, Dr. William S. Morris, Robert W. Crenshaw, John S. Langhorn and Charles Scott, "a company of gentlemen residing in Lynchburg, in the State of Virginia", and put them in possession.

This suit was brought in equity, in Fulton superior court, to enjoin the defendants from using the line and to compel an accounting to the plaintiffs. The theory of the suit was that Hammett, at the time of the foreclosure sale in Tennessee, was present at the sale, representing himself and Glover, and agreed for himself and Glover to release to James and William Kelly, the purchasers at the sale, all rights under the Georgia judgments (and consequently that they were estopped to assert thereafter any rights under the Georgia judgments). The defendants' theory was that this agreement by Hammett was conditional on payment of certain notes, which notes had not been paid (and consequently that the estoppel did not become operative). There was also a question whether the Tennessee court had any jurisdiction to sell any part of the line in Georgia.

The injunction was refused, and the plaintiff appealed to the supreme court of Georgia. That court refused to decide the question as to the jurisdiction of the Tennessee court, and affirmed the judgment on the ground that the defendants were in possession and that the plaintiffs had not shown any equity superior, or even equal, to the defendants'.